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LOOKING FOR A BETTER WAY: THE SANCTION LAWS OF KEY U.S. ALLIES

BARRY E. CARTER*

I. INTRODUCTION

When it comes to imposing economic sanctions for foreign policy purposes, the Chief Executives of the United Kingdom, West Germany, and Japan have broad authority to control their respective countries' exports, imports, and private financial transactions. This authority differs from that of the U.S. President who, under present U.S. law, has wide discretion to cut off almost all exports, but has only limited control over imports and over foreign loans by private U.S. banks.¹ This is in the absence of a declared national emergency, where the President has sweeping powers.²

The more extensive authority possessed by the leaders of major U.S. allies is especially noteworthy because these countries are parliamentary democracies, which should enable their Chief Executives to more easily push new laws through their legislatures during a foreign policy dispute or minor crisis. In contrast, one or both houses of the U.S. Congress often is controlled by the opposition party which might balk at or at least slow a legislative initiative of the President.

Many reasons, including historical and cultural ones, as well as existing institutional arrangements, help to explain these differences. There is, however, no comprehensive

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1. The U.S. laws will be discussed in Carter, *International Economic Sanctions: Improving the Haphazard U.S. Regime*, forthcoming in 75 CALIF. L. REV. (1987) and will be treated more comprehensively in B. CARTER, *INTERNATIONAL ECONOMIC SANCTIONS: IMPROVING THE HAPHAZARD U.S. REGIME*, to be published by Cambridge University Press in 1988.

2. E.g., Giraudo, *Waging Economic Warfare: The Sanctions Power Under the Constitution*, 19 N.Y.U. J. INT'L L. & POL. 935 (1987) (elsewhere in this issue).

comparative study of the various countries' laws on sanctions.

Although such an analysis is beyond the scope of this Article, a brief study of sanction laws in the United Kingdom, West Germany, the European Community, and Japan³ underscores the possibility of the United States adopting a different approach.⁴ Among the issues addressed in this Article are the relative difficulty in imposing import and private credit controls versus export controls, the protections accorded individual businesses, and the relations between the governments of U.S. allies and their private international banks.

II. SANCTIONS BY U.S. ALLIES

A. *United Kingdom*

In the United Kingdom, the Executive has very broad authority to impose economic sanctions for foreign policy purposes. Three statutes appear central to the British Cabinet's ability to impose sanctions without further legislation. One regulates the export and import of goods; the other two govern financial transactions.

The Import, Export and Customs Powers (Defence) Act of 1939 grants the Secretary of State broad authority to pro-

3. A brief look at another U.S. ally, Australia, suggests that the Prime Minister there has broad powers to prohibit imports as well as exports under the Customs Law of 1901. In the past, Australia has imposed economic sanctions against Rhodesia, Iran, the Soviet Union, North Vietnam, France, Argentina, and South Africa. Existing contracts usually seem to be honored, with the controls only applying to future transactions. G. Herndon, *Import and Export Controls as Economic Sanctions: A Comparison of the American and Australian Approaches* (1986) (unpublished paper on file at Georgetown University Law Center).

4. These observations may also encourage further, much-needed comparative studies. An excellent example is J. JACKSON, J.V. LOUIS & M. MATSUSHITA, *IMPLEMENTING THE TOKYO ROUND* (1984), a comparative analysis of how U.S., European Economic Community, and Japanese legal systems affect the development of international agreements on economic matters, with a focus on the trade agreements reached in the 1970s at GATT's Tokyo Round of negotiations. Another excellent, though more limited, example is Hein, *Economic Embargoes and Individual Rights Under German Law*, 15 *LAW & POL'Y INT'L BUS.* 401 (1983), a comparison of West German and U.S. laws on economic sanctions.

hibit the export or import of any good for any reason.⁵ Although designed as a temporary wartime measure, it remains in active use today.⁶ This statute was used as part of the United Kingdom's effort to ban exports to Iran in 1980 and to ban trade with Southern Rhodesia in 1965.⁷

The second statute is the Exchange Control Law of 1947, which gives the Treasury broad power to restrict or prohibit transactions in foreign currency.⁸ This law, however, apparently has been used only once to impose economic sanctions: for two months in 1979 to continue sanctions against Southern Rhodesia when those against other countries were lifted.⁹

The third statute, the Emergency Laws Act of 1964, con-

5. 2 & 3 Geo. 6, ch. 69. Section 1(1) provides: "The Board of Trade may by order make such provisions as the Board think expedient for prohibiting or regulating . . . the importation into, or exportation from, the United Kingdom . . . of all goods or goods of any specified description." See also C. SCHMITTHOFF, *THE EXPORT TRADE: A MANUAL OF LAW AND PRACTICE* 305 (1950).

6. Import, Export and Customs Powers (Defence) Act of 1939, 2 & 3 Geo. 6, ch. 69, § 9(3). The Act today provides the legal authority for British import and export licensing requirements. See Import of Goods (Control) Order, Stat. Inst. No. 23 (1954) (prohibiting the importation of all unlicensed goods into the United Kingdom); Export of Goods (Control) Order, Stat. Inst. No. 849 (1985) (prohibiting the export of certain goods from the United Kingdom unless they are licensed). The latter order also controls the export of strategic goods and technology to Communist countries. *Id.* arts. iv, vii.

The statute was recently upheld against a challenge as to whether it authorized the Secretary of State to impose Commonwealth import preferences protecting the Caribbean producers and shippers of bananas. *Regina v. Secretary of St. for Trade ex parte Chris Int'l Foods Ltd.*, 1983 T.L.R. 528 (Q.B.). The court noted that the Secretary of State's powers under § 1 were not "unfettered," but had to be exercised "reasonably and not arbitrarily." *Id.*

7. See *infra* notes 13-14 and accompanying text (concerning the use of country-specific legislation).

8. 10 & 11 Geo. 6, ch. 14.

9. All exchange controls, except those regarding Southern Rhodesia, were abolished in October 1979. See Stat. Inst. Nos. 1331-37 (1979). The Southern Rhodesia controls were finally lifted in December, when a general exemption was issued. The Exchange Control (General Exemption) Order, Stat. Inst. No. 1660 (1979); see also The Control of Gold and Treasury Bills (Southern Rhodesia) (Revocation) Directions, Stat. Inst. No. 1661 (1979). The last item lifted exchange bans ordered under the Emergency Laws (Re-Enactment and Repeals) Act, 1964, ch. 60.

trols financial transactions that the Treasury believes are "to the detriment of the economic position of the United Kingdom."¹⁰ The Treasury used this statute in 1982 to freeze all Argentine assets in British banks during the Falklands crisis¹¹ and in 1965 to prohibit the transfer of gold and other securities to Southern Rhodesia.¹²

Although the British Cabinet has this broad statutory authority, it often seeks specific authority from Parliament to respond to a particular crisis. The Cabinet sought such authority in acting against Iran¹³ and Southern Rhodesia,¹⁴ but not Argentina. Even though country-specific legislation might be requested in order to clarify ambiguities in the general laws, the request also appears to be a vehicle for obtaining a demonstration of domestic political support.¹⁵

10. Emergency Laws (Re-Enactment Repeals) AC, 1964, § 2(1).

11. Control of Gold, Securities, Payments and Credits (Argentine Republic) Directions, Stat. Inst. No. 512 (1982), *repealed by* Stat. Inst. No. 1296 (1982); see Amine, *Economic Sanctions: Falkland Islands (Malvinas)*, 23 HARV. INT'L L.J. 404, 405 n.2 (1983).

12. Control of Gold and Treasury Bills (Southern Rhodesia) Directions, Stat. Inst. No. 1939 (1965), *repealed by* Control of Gold and Treasury Bills (Southern Rhodesia) (Revocation) Directions, Stat. Inst. No. 1661 (1979).

13. The British Cabinet seemed reluctant to use general statutory authority to impose sanctions on Iran without a specific mandate from Parliament. Orders issued under the Import/Export Act went only as far as those authorized by the Iran (Temporary Powers) Act, 1980, ch. 28.

14. Orders against Southern Rhodesia under the Import/Export Act were issued in conjunction with those issued under the United Nations Act, 1946, 9 & 10 Geo. 6, ch. 45, § 1, and the Southern Rhodesia Act, 1965, ch. 76. Together, they effectively banned all exports from the United Kingdom to Rhodesia and 95% of all imports, including oil. See G. HUFBAUER & J. SCHOTT, *ECONOMIC SANCTIONS RECONSIDERED* 409-10 (1985).

15. Another statute also appears to grant the Cabinet power to impose sanctions, although it has not been used in this manner. Under the Trading with the Enemy Act, 1939, 2 & 3 Geo. 6, ch. 89, the Board of Trade may label any country an "enemy," thereby rendering impermissible trade with that country. This could be used to cut off all commercial transactions with that country.

Ian Fagelson, an English solicitor at the Warner Cranston firm in London, also writes: "It is generally believed that the Crown has, by virtue of its prerogative, considerable non-statutory powers to regulate the movement of goods and persons into and from the country and to take other actions necessary to procure the safety of the Realm. However the precise ambit of the Royal prerogative is unclear. Accordingly, in modern

The Cabinet has additional authority to impose sanctions as a result of U.K. participation in multilateral organizations. Under the United Nations Act, the U.K. Government may take whatever steps are necessary to implement Security Council regulations.¹⁶ Under the European Communities Act, the Cabinet has the power to implement European Community legislation.¹⁷

These statutes enable the British Prime Minister and Cabinet to impose comprehensive controls over exports, imports, and private financial transactions for foreign policy reasons.

B. *West Germany*

West Germany has a relatively simple legal framework that differs from the U.S. method of regulating foreign commerce. The basic German statute on foreign commerce is the *Aussenwirtschaftsgesetz* of 1961 (hereinafter AWG).¹⁸ Though relatively short, the AWG governs all international commercial transactions by West German residents, including exports, imports, payments, and capital movements.¹⁹ As a result, many of the AWG's provisions apply across all of these transactions.²⁰ To the extent that the West German

times it has been thought necessary to enact legislation specifically conferring certain powers on the Crown." Letter from Ian B. Fagelson to Arthur T. Downey at 1 (Sept. 25, 1986) [hereinafter Fagelson letter] (copy on file at the Georgetown University Law Center).

16. United Nations Act, 1946, 9 & 10 Geo. 6, ch. 45, § 1.

17. European Communities Act, 1972, ch. 68, §§ 2(2), (4); *see also infra* text accompanying notes 31-46 (about the European Community).

18. [1961] 1 Bundesgesetzblatt [BGBl] 481, *as amended*, [1980] 1 BGBl 1905 [hereinafter AWG].

19. Section 1(1) of the AWG defines foreign commerce as "[t]he exchange of goods, services, capital, payments and other economic valuables with foreign economic areas as well as the exchange of foreign economic valuables and gold if carried out by residents." AWG, *supra* note 18, § 1(1), *transl. in* Hein, *supra* note 4, at 404 n.13.

20. Hein, *supra* note 4, at 422 ("[T]he German Executive's powers are consolidated in one Statute establishing a uniform standard for the restriction of different forms of foreign commerce.").

In addition to having direct statutory authority over private credit, the German Government has developed a variety of effective instruments for influencing the international behavior of German banks. For example, the Government successfully prodded the banks to extend a DM 1.2 billion (over \$600 million) loan to Poland during 1980. The Government

Executive has the authority to impose sanctions, his authority is similar for exports, imports, and private credit transactions. This contrasts with the present haphazard U.S. law in this area.

In addition to providing the Executive with similar power over different economic activities, the AWG provides businesses with a number of protections not found in existing U.S. law, particularly U.S. export laws. For example, a critical principle embodied in the AWG is that the freedom to engage in commerce is an individual right.²¹ This principle represents a dramatic change in the West German legal system from that which existed prior to 1961. Under the prior statute, which dates from the Occupation, foreign commerce was prohibited and any exception required a government license.²²

Although the West German Executive is authorized to restrict foreign commerce through regulations, the controls must be imposed in specific ways and for specific purposes.²³ One important constraint is that West German courts "look more closely into foreign commerce actions than do U.S. courts."²⁴ Possibly even more important, existing contracts are exempted from sanctions as much as possible, and sanctions affecting existing contracts or the withdrawal of existing licenses "would generally require compensation."²⁵

did this by combining export credit guarantees with persuasion. J. SPINDLER, *THE POLITICS OF INTERNATIONAL CREDIT* 30-34 (1984).

21. The AWG's first provision states that "[f]oreign commerce is free in principle." AWG, *supra* note 18, § 1(1), *transl. in* Hein, *supra* note 4, at 404 n.14.

22. Hein, *supra* note 4, at 404-05. The theory underlying present U.S. export law, that it is a privilege to export, not a right, is closer to the former German laws. *See, e.g.,* *Buttfield v. Stranahan*, 192 U.S. 470, 493 (1904) (upholding an import statute and stating that "no individual has a vested right to trade with foreign nations"). This view is recognized in the legislative history of the Export Administration Act. S. REP. NO. 169, 96th Cong., 1st Sess. 3-4 (1979).

23. This authority is premised primarily on the existence of a threat to national security, international peace, foreign policy, or the national economy. Hein, *supra* note 4, at 405.

24. *Id.* at 423; *see also id.* at 406 (German courts review executive actions in the area of foreign policy more closely than do U.S. courts).

25. *Id.* at 423; *see also id.* at 415-22 (discussing the relationship between individual rights and sanctions).

C. *The European Community*

The European Community²⁶ can limit the ability of its members, such as the United Kingdom and West Germany, to impose unilateral sanctions, and can impose sanctions itself against nonmember states. The laws of the European Community are particularly restrictive regarding the imposition of sanctions between the twelve Member States. The Treaty of Rome of the European Economic Community (hereinafter EEC Treaty) prohibits export or import controls and restrictions on the flow of private credit between the Member States for foreign policy reasons.²⁷

26. The European Community is technically three communities established by separate treaties: the European Economic Community (hereinafter EEC) established under the Treaty of Rome, *done* Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty]; the European Coal and Steel Community (hereinafter ECSC) established under the Treaty Instituting the European Coal and Steel Community, *done* Apr. 18, 1951, 261 U.N.T.S. 140; and the European Atomic Energy Community established under the Treaty Establishing the European Atomic Energy Community, *done* Mar. 25, 1957, 298 U.N.T.S. 167.

Present members of the European Community include Belgium, Denmark, the Federal Republic of Germany, France, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom.

There has been increasing integration among the three Communities. For example, in 1965, a single Council and Commission were established. *See* Treaty Establishing a Single Council and a Single Commission of the European Communities (Merger Treaty), Apr. 8, 1965, 4 I.L.M. 776. More recently, in 1986, the Conference of the Representatives of the Governments of the Member States adopted an act that included EEC Treaty modifications concerning foreign policy coordination as well as community institutions, monetary cooperation, research and technology, environmental protection, and social policy. *See* Single European Act, *done* Feb. 17 & 28, 1986, 25 I.L.M. 503 (1986). It has been sent to the twelve Member States for their approval.

For an excellent general discussion of the European Community's legal framework of international trade, see Louis, *The European Economic Community and the Implementation of the GATT Tokyo Round Results*, in J. JACKSON, J.V. LOUIS & M. MATSUSHITA, *supra* note 4, at 21.

27. EEC Treaty, *supra* note 26, arts. 9 (prohibition against customs duties between Member States), 10 (free movement of goods), 30-37 (elimination of quantitative restrictions), 67-73 (movement of capital). The provisions reflect the original intent of the Member States to integrate their economies.

Member States, however, have imposed certain monetary controls in times of domestic economic difficulties. For example, in 1983 the Mitterrand Government limited the amount of currency a French citizen could

The European Community apparently can also limit the flexibility of its members in taking action against nonmember states. Consistent with the primary focus of the EEC Treaty, the use of import controls is most restricted. A Member State might nonetheless be allowed to impose import controls against a nonmember country. The possibility of indirect trade through another Member State, however, makes any attempted unilateral import controls relatively ineffective, depending on the cost of transshipment. For example, the United Kingdom can ban the import of diamonds from South Africa,²⁸ but it cannot prohibit the import of diamonds from South Africa to the United Kingdom by way of another Member State as long as the diamonds have cleared customs in that Member State.²⁹

The laws of the European Community do not appear to prohibit unilateral controls over exports to a third country nor over private credit transactions with entities there. Some questions, however, may be raised under the EEC Treaty provisions regarding the "common commercial policy" and under other provisions regarding consultation among the Member States.³⁰

The European Community itself can impose sanctions. The Community has clear authority to restrict imports in many situations, and some apparent authority to regulate ex-

take out of the country, including to a Member State. Articles 104 through 109 of the EEC Treaty allow Member States to implement certain actions when "seriously threatened with difficulties as regards . . . [the] balance of payments." *Id.* art. 108. However, the legal limits by the Community on a Member State's actions are not always clear. See generally E. STEIN, P. HAY & M. WAELBROECK, *EUROPEAN COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVE* (1976 & Supp. 1985).

28. See Fagelson letter, *supra* note 15, at 3.

29. EEC Treaty, *supra* note 26, art. 9(2). Article 10(1) of the EEC Treaty provides that "Products coming from a third country shall be considered to be in free circulation in a Member State if the import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied in that Member State"

30. See *id.* arts. 110-16 (common commercial policy), 224 (consultation); see also Single European Act, *supra* note 26, tit. III (provision on Community cooperation in the sphere of foreign policy). Many see the European Community as a political institution that does not have a clear legal framework for all of its actions. See generally E. STEIN, P. HAY & M. WAELBROECK, *supra* note 27.

ports and private credit. For example, the Community has previously imposed sanctions against Rhodesia, Iran, the Soviet Union, Argentina, and South Africa.³¹

In deciding whether to impose economic sanctions, the Foreign Ministers of the Member States usually focus initial discussions on what steps to take and also on the choice "between a true Community approach or a perhaps coordinated but separate implementation" of measures.³² The exact legal bases for imposing sanctions often are delineated at a later time and sometimes even left vague in official documents of the Community.³³ This approach partly reflects the evolving growth of a supranational organization.

A review of the Community's laws and its past uses of sanctions indicates, however, that it does have a strong legal basis for imposing import controls. Article 113 of the EEC Treaty, which provides for "implementing the common commercial policy,"³⁴ is used most often. When proposed sanc-

31. See *infra* text accompanying notes 37-44; see, e.g., Kuyper, *Community Sanctions Against Argentina: Lawfulness Under Community and International Law*, in *ESSAYS IN EUROPEAN LAW AND INTEGRATION* 141 (D. O'Keeffe & H. Schermers eds. 1982); 29 O.J. EUR. COMM. (No. L 268) 1 (1986) (sanctions on iron and steel products originating in South Africa); 29 O.J. EUR. COMM. (No. L 305) 11, 45 (1986) (sanctions against South Africa).

32. Kuyper, *supra* note 31, at 144.

33. See *infra* text accompanying notes 42-44 (discussing the import ban on certain South African iron and steel products).

The Council and the Commission can choose among different legal vehicles to implement a measure. The choice between, say, issuing a regulation or a directive has a substantive impact on how a measure is implemented by the Member States. Article 189 of the EEC Treaty, *supra* note 26, provides for regulations, directives, decisions, recommendations, and opinions. It reads in part:

A regulation shall have general application. It shall be binding in its entirety and directly applicable to all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety upon those to whom it is addressed.

Recommendations and opinions shall have no binding force.

Id.

34. Article 113(1) of the EEC Treaty, *supra* note 26, states that "the common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation,

tions do not fall under the common commercial policy, the Member States can still consult with each other pursuant to article 224 of the EEC Treaty and decide to implement sanctions individually.³⁵ Article 223 provides a specific basis for sanctions involving "trade in arms, munitions, and war material." Article 235 provides a residual basis for action by allowing the Council of Ministers to take "appropriate measures" if action by the Community is necessary to attain one of its objectives and the EEC Treaty does not provide the necessary powers.³⁶

export policy and measures to protect trade such as those to be taken in case of dumping and subsidies." The full scope of the EEC's broad powers under article 113 remains "undetermined and controversial" because the term "common commercial policy" is not defined in the Treaty of Rome. Schwarze, *Towards a European Foreign Policy — Legal Aspects*, in *TOWARDS A EUROPEAN FOREIGN POLICY* 69, 71 (J.K. de Vree, P. Coffey, R.H. Lauwaars eds. 1987).

35. Kuyper notes the "Council's traditional theory that the goal of the measure concerned determines whether it falls under the common commercial policy. . . ." Kuyper, *supra* note 31, at 143. See Schwarze, *supra* note 34, at 72. For example, Kuyper concludes that the European Community declined to rely on article 113 of the EEC Treaty, but instead chose article 224 of the EEC Treaty to impose sanctions against Rhodesia in 1966 and 1968 because of the Community's concern that the trade sanctions called for by the United Nations against Rhodesia were "primarily of a political and security nature" and, therefore, were not within the Community's competence as delineated in article 2 of the EEC Treaty. Kuyper, *supra* note 31, at 143.

Kuyper, however, believes that the process leading to the decision to impose sanctions under article 113 also can be viewed as part of article 224 framework of consultation. *Id.* at 148. Article 224 provides:

Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war or serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.

EEC Treaty, *supra* note 26, art. 224.

36. Article 235 provides:

If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, take the appropriate measures.

Recent sanctions illustrate the Community's approach. In March 1982, the Community reduced the level of certain imports from the Soviet Union to protest events in Poland.³⁷ The action was taken by a regulation pursuant to article 113 of the EEC Treaty.³⁸

When Argentina seized the Falkland Islands in the spring of 1982, the British not only responded with military force, but also imposed extensive economic sanctions, including a freeze on Argentine assets. For the most part other Member States resorted to import sanctions. The European Community Council unanimously decided in April 1982 to impose a temporary import ban on Argentine products through a regulation also made pursuant to article 113.³⁹ Although some loopholes in the ban diminished its immediate impact,⁴⁰ the Council decision and its basis were correctly viewed as an important precedent for handling future crises.⁴¹

In 1986, after unsuccessfully encouraging South Africa to take certain steps to ameliorate its apartheid system, the Foreign Ministers of the Member States agreed on several

EEC Treaty, *supra* note 26, art. 235.

In a major article, Prof. Jurgen Schwarze analyzes the EEC's external activities within the alternative framework of the European Political Cooperation (hereinafter EPC). Schwarze, *supra* note 34. He describes the EPC as a "extra-Community consultative mechanism in the area of foreign relations. . . . [Despite] various organisational and institutional links to the Community, legally speaking, the EPC is a strictly intergovernmental co-operation mechanism and thus stands outside the Community's legal system." *Id.* at 75. Schwarze adds that: "The European foreign policy of today is conducted with two different legal systems. (EEC Treaty and EPC). Although there are fundamental legal differences in theory and nature it is often difficult to define the different foreign policy matters in practice. There are many links and overlappings to be noticed. Under the present legal system a clear distinction especially between foreign commercial policy matters of the Treaty (Art. 113) and European foreign political affairs of the EPC, often seems impossible." *Id.* at 78-79.

37. See Kuyper, *supra* note 31, at 141.

38. Council Reg. (EEC) No. 596/82, 25 O.J. EUR. COMM. (No. L 72) 15 (1982).

39. See Council Reg. (EEC) No. 877/82, 25 O.J. EUR. COMM. (No. L 102) 1 (1982).

40. For example, the embargo exempted contracts concluded prior to the April 16 effective date of the EEC decision. See *id.* art. 2.

41. See, e.g., Hein, *supra* note 4, at 408-09; Kuyper, *supra* note 31, at 147-51.

measures, including a ban on the import of gold coins, iron, and steel.⁴² The regulation prohibiting the importation of gold coins was made pursuant to article 113.⁴³ South African iron and steel products were banned by a Council Decision made under the European Coal and Steel Community Treaty,⁴⁴ which governs the competence of the European Community over such products, rather than under article 113 of the EEC Treaty.

Although the European Community has not made extensive use of export controls for foreign policy purposes, it does appear to have some power to impose them. For instance, in 1980 the Community imposed an embargo on the sale of arms to Iran, to be implemented individually by each Member State pursuant to article 223 of the EEC Treaty.⁴⁵ Article 223 is narrow in scope, however, dealing with national security issues such as "trade in arms, munitions and war material." Nevertheless, a case might be made that "common commercial policy" specifically includes export policy given the language of article 110 of the EEC Treaty, and hence, that article 113 is also available as a legal basis for export controls. Furthermore, articles 224 and 235 are not specifically limited to import controls and may also extend to export controls.

Similarly, the European Community may have some power to impose controls over private credit. In addition to articles 224 and 235, articles 67 through 73 of the EEC Treaty give the Community considerable authority over capital movements. In the case of South Africa, the European

42. See Council Reg. (EEC) No. 3302/86, 29 O.J. EUR. COMM. (No. L 305) 11 (1986). The regulation exempted "import documents issued and contracts concluded before the entry into force of this Regulation." *Id.* art. 2.

43. *Id.*

44. Council Decision 86/459/ECSC, 29 O.J. EUR. COMM. (No. L 268) 1 (1986). No specific article of the ECSC Treaty was cited. As with the regulation on gold coins, there is a contract sanctity provision. The ban will affect imports that have been worth about \$424 million per year. 3 Int'l Trade Rep. (BNA) 1123, 1124 (Sept. 17, 1986).

Article 71 of the ECSC Treaty reserves to Member States the authority for commercial policy for coal and steel products. Article 113 of the EEC Treaty has not absorbed this reservation. See Louis, *supra* note 26, at 38.

45. Kuyper, *supra* note 31, at 145.

Community Council implemented a ban on new direct investment in that country.⁴⁶ This could be viewed as a control on the export of capital, or as a restriction on capital movements. The Council directive banning new South African investments specifically cited article 235, the residual provision discussed above. Moreover, in the memorandum from the Commission to the Council proposing the directive, the definition of new direct investment is based on an earlier directive that implemented article 67 of the EEC Treaty, which deals with capital movements.⁴⁷ This blending of articles 67 and 235 makes the South African directive a possible precedent for future export or credit controls.⁴⁸

D. *Japan*

The Japanese Government has been hesitant to impose economic sanctions for foreign policy purposes,⁴⁹ but it has the power to employ them when necessary. Although the Japanese Government lacks the extensive, explicit statutory powers of the governments in the United Kingdom and West Germany, particularly over exports, it relies on its economic control legislation as the basis for its authority to impose sanctions and on "administrative guidance" as the primary means for their implementation. This guidance encompasses a range of measures by which the various government ministries are able to influence voluntary compliance by private entities.⁵⁰

Two statutes are central to the ministries' authority to

46. Council Dec. No. 86/517/EEC, 29 O.J. EUR. COMM. (No. L 305) 45 (1986).

47. Proposal for a Council Directive Suspending New Direct Investment in the Republic of South Africa by Residents of the Community, COM(86) 522 final, Sept. 24, 1986, at 2.

48. Since capital movements are differentiated in articles 67-73 of the EEC Treaty, it seems that the directive is a better precedent for future controls on capital.

49. This hesitancy reflects Japan's dependence on international trade and its post-World War II policy of avoiding diplomatic disputes.

50. For an overview of Japanese laws regulating international trade and credit, see generally Matsushita, *Japan and the Implementation of the Tokyo Round Results* [hereinafter Matsushita, *Japan*], in J. JACKSON, J.V. LOUIS & M. MATSUSHITA, *supra* note 4, at 77, 89-97; Smith, *The Japanese Foreign Exchange and Foreign Trade Control Law and Administrative Guidance: The Labyrinth and the Castle*, 16 LAW & POL'Y INT'L BUS. 417 (1984).

control foreign transactions. The first, the Foreign Exchange and Foreign Trade Control Law (hereinafter FECL),⁵¹ permits the relevant ministry to prohibit or restrict transactions involving the import or export of goods or involving foreign exchange or investment.

Although the FECL gives Japanese ministries broad discretion, its purpose is limited to economic objectives.⁵² Moreover, the FECL even recognizes a freedom to export. Article 47 provides: "Export of goods from Japan shall be permitted with the minimum restrictions thereon consistent with the purpose of this Law."⁵³ Indeed, in a rare judicial challenge to ministerial authority, the Tokyo District Court in 1969 held that Japanese enforcement of export controls pursuant to an agreement with its allies on the Consulative Group Coordination Committee (hereinafter CoCom)⁵⁴ was outside the scope of the FECL and unlawfully intruded upon the constitutional right to export.⁵⁵ This CoCom case and the FELC's recognition of a citizen's freedom to export suggest that the Government's power to control exports may be more limited than its power to control imports.⁵⁶

The second statute, the Export and Import Transactions

51. Gaikokukawase oyobi gaikokuboeki kanri ho, Law No. 228 of 1949, as amended.

52. Article 1 provides:

This Law has as its objective the sound development of the national economy together with the balance of international payments and currency stabilization, taking as its basic tenet the liberalization of foreign exchange, foreign trade, and other foreign transactions, based on the minimum restrictions necessary for the control or regulation of foreign transactions, to further the normal development of foreign transactions.

Transl. in Matsushita, Japan, supra note 50, at 134 n.42.

53. *Id.* at 90.

54. The CoCom was created in 1949 by the United States and six European allies to coordinate efforts to block many exports to communist countries. CoCom was expanded in 1952-1953 and now includes Japan and all NATO allies except Iceland and Spain. For a discussion of CoCom, see generally Hunt, *Multilateral Cooperation in Export Controls—The Role of CoCom*, 14 U. Tol. L. Rev. 1285 (1983).

55. See Matsushita, *Japan, supra note 50, at 91*; Matsushita, *Export Control and Export Cartels in Japan*, 20 HARV. INT'L L.J. 103, 106-08 (1979) (citing *Pekin-Shanghai Nihon Kogyo Tenrankai v. Nihon*, 20 Gyosei Reishu 842 (Tokyo Dist. Ct. 1969)).

56. Matsushita, *Japan, supra note 50, at 94-95.*

Law (hereinafter Transactions Law),⁵⁷ grants the Ministry of International Trade and Industry (hereinafter MITI) broad authority over private export and import agreements. If MITI believes that any of these agreements might produce results that are harmful to the Japanese economy, MITI can set export prices and quantities, or issue orders that limit imports.⁵⁸ Like the FECL, the Transaction Law is also limited to economic objectives.

The restrictions to economic purpose expressed in the FECL and the Transactions Law do not, however, prevent the Government from controlling exports, imports, and private credit for non-economic foreign policy reasons. The plaintiffs in the CoCom case were denied recovery because they failed to prove that MITI imposed the export controls maliciously or negligently.⁵⁹ Moreover, this 1969 case is the only "successful" legal challenge to MITI's attempts to control foreign trade for foreign policy reasons, and Japan continues to participate with its allies in the CoCom.

Much of the Japanese Government's ability to use economic sanctions is because many of the controls of MITI are imposed through "administrative guidance," rather than specific legal authority. In Japan, administrative guidance, often of an informal variety, is a primary means of government regulation.⁶⁰ In the area of foreign trade regulation, for example, MITI has used administrative guidance to induce Japanese exporters to comply with voluntary restraint agreements made with the United States. In these cases, MITI threatened to invoke its authority under the Transactions Law to fix prices and quantities, but was able to achieve compliance without having to do so.⁶¹

Japanese ministries have also used administrative guidance to expand their authority under the FECL. For example, under the statute, most foreign commercial transactions do not require prior ministerial approval, but do require prior notification to the "relevant" ministry.⁶² The minis-

57. Yushutsunyu torihiki ho, Law No. 299 of 1952, as amended.

58. *Id.* arts. 28 (exports), 7-2(1) and 30(1) (imports); see Matsushita, *Japan*, *supra* note 50, at 92-93, 96.

59. Matsushita, *Japan*, *supra* note 50, at 94-95.

60. See Smith, *supra* note 50, at 418-20.

61. Matsushita, *Japan*, *supra* note 50, at 93-94.

62. Smith, *supra* note 50, at 425.

tries have designated the Bank of Japan as the governmental entity to receive the notification documents required under the FECL and to determine which ministry has jurisdiction over the transaction.⁶³ As a result, a party usually must consult with the Bank even before submitting any documents. In addition, if the relevant ministry objects to the proposed transaction as it is initially submitted by a party, it may "informally decline to formally accept" a party's documentation.⁶⁴ In this way, ministries may express their initial disapproval and then negotiate with a party rather than having to prohibit officially an unfavored transaction.⁶⁵

A party has incentives to heed the administrative guidance from the ministries because their favor is likely to be needed later. The ministries have been known to retaliate against uncooperative companies in unrelated areas.⁶⁶ Thus, well before the party has submitted documents or the ministry has taken official action, an informal approval process is underway, and the legal steps that follow are usually *pro forma*.⁶⁷

Using its statutory authority and administrative gui-

63. *Id.* at 428.

64. *Id.*

65. *Id.* at 427-32.

66. *Id.* at 426.

67. *Id.* at 431-32. As an example of the result, in the specific area of private credit, Japan appears to coordinate its foreign policy closely with its large private banks. This reflects both an extension of the domestic economic and political relationships in Japan and the importance to it of international trade and finance. J. SPINDLER, *supra* note 20, at 114-34; Spindler, *The Growing Entanglement of International Banking and Foreign Policy*, 8 TRANSATL. PERSP., May 1983, at 3, 4.

There are also specific government incentive programs. For example, MITI administers and underwrites export insurance covering many commercial and political risks. These include essentially all risks incurred by Japanese banks as a result of a foreign buyer's default. Noncommercial considerations regularly affect decisions on the allocation of insurance. During the early 1980s, MITI insurance covered more than 40% of all Japanese exports. In contrast, the guarantee and insurance programs of the U.S. Eximbank were equivalent to roughly 3% of U.S. exports for 1981. J. SPINDLER, *supra* note 20, at 122-23.

Possibly even more important, the continuing and frequent administrative guidance by the Japanese Government "has given the government a highly effective means of informally influencing Japanese banks' overseas business behavior." *Id.* at 134.

dance, the Japanese Government has shown itself capable of imposing economic sanctions for foreign policy reasons. For example, despite extensive economic ties with Iran, Japan did take some mild steps against that country in 1979 during the American hostage crisis. Japan agreed not to buy Iranian oil on the spot market and to hold its total imports of Iranian oil to pre-hostage levels.⁶⁸ In response to the Soviet invasion of Afghanistan, Japan in 1980 restricted both credit to the Soviet Union and its export of capital machinery and high technology.⁶⁹ In September 1986 Japan prohibited new contracts for the purchase of iron and steel from South Africa until the South African Government "demonstrates its concrete will to abolish apartheid."⁷⁰

III. CONCLUSION

In short, although comparisons between countries and their legal systems should always be undertaken with caution, the preceding observations suggest that present U.S. laws are not necessarily the only, or even the best, approach

68. See Yoshitu, *Iran and Afghanistan in Japanese Perspective*, 21 *ASIAN SURV.* 501 (May 1981). Japan, however, refused to give up the Iran-Japan Petrochemical Company, a \$2 billion capital investment for Japan that was 85% complete in 1980, and did not place any controls on its banks, which helped Iran circumvent the U.S. freeze on Iranian assets. *Id.* at 504-05.

69. Japan also boycotted the Moscow Olympics and limited the exchange of trade personnel. Kerns, *An Outfall in the East*, *FAR. E. ECON. REV.*, July 24, 1986, at 43.

As a result of Japan's economic sanctions, it slipped from being the Soviets' second largest non-communist trading partner (after West Germany) to being its fifth largest. Business pressures led Japan to gradually ease its sanctions. *Id.*

By December 1981, when President Reagan called for more sanctions against the Soviet Union because of the political situation in Poland, Japan limited itself to largely symbolic gestures, such as the cancellation of some trade meetings between Soviet and Japanese officials. Japan opposed the U.S. export prohibitions on oil and gas equipment and technology, which threatened to delay a major Japanese-Soviet oil and gas project. *Id.*

70. *Wash. Post*, Sept. 20, 1986, at A16, col. 1. Japan also approved three other steps which were largely symbolic. These included a "confirmation" of the lack of air service between the two countries by their national airlines, curbs on tourism, and a cutback in the use by Japanese officials of South African airways. *Id.*; *N.Y. Times*, Sept. 19, 1986, at A3, col. 4.

for resorting to economic sanctions for foreign policy purposes.